Re: Lau Kah Hing; ex parte: Institut Memandu Maju Jaya Sdn Bhd (in liquidation)

HIGH COURT (SIBU) — BANKRUPTCY PROCEEDINGS NO SBW-29NCC-90/11 OF 2021 (HC)
WONG SIONG TUNG J
27 MARCH 2024

Bankruptcy — Act of bankruptcy — Deferment of act of bankruptcy — Application to set aside bankruptcy order on the ground that creditor's petition was not presented within prescribed time — Whether act of bankruptcy deferred when judgment debtor applied to set aside bankruptcy notice — Whether creditor's petition presented within prescribed time

Bankruptcy — Creditor's petition — Service of creditor's petition — Application to set aside bankruptcy order on the ground that creditor's petition was not served to judgment debtor — Application to set aside bankruptcy order on the ground that creditor's petition was not presented within prescribed time — Whether it was permissible to serve creditor's petition on firm of advocates appointed by judgment debtor — Whether judgment debtor precluded from claiming that he did not authorise his current firm of advocates to accept service of creditor's petition on his behalf — Whether creditor's petition presented within prescribed time — Insolvency Act 1967 ss 3(1)(i) & 5(1)(c) — Insolvency Rules 2017 r 93(2)

The judgment creditor had precured the issuance of a bankruptcy notice by the court against the judgment debtor on 8 November 2021. The said bankruptcy notice was served by way of substituted service on 5 January 2022. The judgment debtor then filed an application to set aside the bankruptcy notice and such application was allowed by the learned senior assistant registrar ('the SAR') on 13 June 2022. On appeal to the judge in chamber, the bankruptcy notice was restored on 19 October 2022. Subsequently, the judgment creditor presented a creditor's petition ('the creditor's petition') against judgment debtor on 25 November 2022. On 3 January 2023, the SAR made a bankruptcy order against the judgment debtor ('the bankruptcy order'). The judgment debtor then filed two notices of application to set aside the bankruptcy order. For the first application ('encl 85'), the ground relied upon was that the judgment debtor was never served with the creditor's petition. The SAR allowed encl 85 and ordered the creditor's petition to be served on judgment debtor within seven days. Dissatisfied with the said decision, the judgment creditor filed the appeal in encl 117 pursuant to O 56 r 1 of the Rules of Court 2012 ('the ROC'). As regard the second application to set aside the

bankruptcy order ('encl 102'), the ground relied upon by the judgment debtor was that the creditor's petition was irregular because it was presented more than six months after the act of bankruptcy allegedly occurred on 17 January 2022. Enclosure 102 was dismissed by the SAR, hence, the appeal in encl 126 by the judgment debtor pursuant to O 56 r 1 of the ROC. With respect to encl 117, the issues to be determined by the court were: (a) whether serving the creditor's petition on judgment debtor's current firm of advocates, who had filed the notice of appointment as judgment debtor's advocates ('encl 13') on record in the bankruptcy action, was permissible in law; and (b) whether the judgment debtor was precluded from claiming that he did not appoint or authorise his current firm of advocates to accept service of the creditor's petition on his behalf. As for encl 126, the central issue that arose was whether the creditor's petition, presented by the judgment creditor, and grounded on the act of bankruptcy stemming from the judgment debtor's non-compliance with the bankruptcy notice issued by the judgment creditor on 8 November 2021 and served on the judgment debtor on 5 January 2022 was out of the prescribed time period under the insolvency law.

Held, allowing encl 117 with cost of RM3,000 and dismissing encl 126 with costs of RM3,000:

(1) It was permissible to serve the creditor's petition on a firm of advocates or solicitors when there was clear indication in writing that the firm of advocates or solicitors had the authority to accept service of the same on behalf of a judgment debtor. The judgment debtor in the present case had appointed his current firm of advocates to act on his behalf in the bankruptcy action and the said firm of advocates had filed the notice of appointment as advocates (encl 13). Enclosure 13 was written indication that confirmed that the judgment debtor's current firm of advocates on record in the present bankruptcy action was authorised to accept service of the creditor's petition on behalf of the judgment debtor in the proceedings in the present bankruptcy action (see paras 38–39 & 42–43).

(2) It would be intolerable and it would lead to the gravest injustice, if the judgment debtor, having appointed his current firm of advocates to represent and act for him in the bankruptcy action and to accept service of documents — particularly when the firm of advocates had indeed accepted service of the creditor's petition — could selectively claim that his chosen and appointed firm of advocates was not authorised to accept on his behalf, the creditor's petition or any documents in the proceedings in the bankruptcy action, all to suit his case. Therefore, the judgment debtor was precluded from claiming that he did not appoint or authorise his current firm of advocates to accept service of the creditor's petition on his behalf (see paras 44–45).

(3) Based on the above reasons, the SAR had erred in law in holding that the service of the creditor's petition on the judgment debtor's current firm of advocates appointed on record to act for the judgment debtor in the bankruptcy action which firm of advocates had in fact accepted service of the bankruptcy notice on behalf of the judgment debtor, was not valid service of the creditor's petition (see para 46).

(4) Pursuant to s 3(1)(i) of the Insolvency Act 1967 ('Act 360'), since the bankruptcy notice in the present case was served on the judgment debtor on 5 January 2022 by substituted service pursuant to court order, the judgment debtor would have committed the act of bankruptcy on 13 January 2022 upon the judgment debtor's non-compliance with the bankruptcy notice. However, the application by the judgment debtor to set aside the bankruptcy notice deferred the act of bankruptcy consequential upon non-compliance thereto until the said application had been heard and determined by the SAR. Since the SAR had allowed the application to set aside the bankruptcy notice on 13 June 2022, there was no act of bankruptcy committed by the judgment debtor then by operation of r 93(2) of the Insolvency Rules 2017. The act of bankruptcy was deemed effective and completed only on 19 October 2022 when the judge in chambers overturned the SAR's order and restored the bankruptcy notice. In this regard, the SAR was correct in law in holding that the act of bankruptcy committed by the judgment debtor was completed or deferred to 19 October 2022 (see paras 51–52, 75–78 & 80).

(5) The judgment creditor presented the creditor's petition against the judgment debtor on 25 November 2022, that was within the six months period prescribed by s 5(1)(c) of Act 360 construed with r 93(2) of the Insolvency Rules 2017 counting from the date of the decision of the previous presiding judge in chambers in restoring the bankruptcy notice, ie, on 19 October 2022. Even when calculating from 13 June 2022, the date of the then SAR's decision to set aside the bankruptcy notice, the creditor's petition presented by the judgment creditor on 25 November 2022 still fell within the prescribed six-months period (see paras 79 & 82).

[Bahasa Malaysia summary

Pemiutang penghakiman telah memperoleh pengeluaran notis kebankrapan oleh mahkamah terhadap penghutang penghakiman pada 8 November 2021. Notis kebankrapan tersebut telah disampaikan melalui penyampaian gantian pada 5 Januari 2022. Penghutang penghakiman kemudiannya memfailkan permohonan untuk mengenepikan notis kebankrapan tersebut dan permohonan tersebut telah dibenarkan oleh penolong kanan pendaftar ('PKP') yang bijaksana pada 13 Jun 2022. Setelah rayuan kepada hakim dalam kamar, notis kebankrapan tersebut telah dikembalikan semula pada

19 Oktober 2022. Setelah itu, pemiutang penghakiman mengemukakan petisyen pemiutang ('petisyen pemiutang tersebut') terhadap penghutang penghakiman pada 25 November 2022. Pada 3 Januari 2023, PKP membuat perintah kebankrapan terhadap penghutang penghakiman ('perintah kebankrapan tersebut'). Penghutang penghakiman kemudiannya memfailkan dua notis permohonan untuk mengenepikan perintah kebankrapan tersebut. Bagi permohonan pertama ('lampiran 85'), alasan yang disandarkan ialah penghutang penghakiman tidak pernah diserahkan dengan petisyen pemiutang. Penolong kanan pendaftar membenarkan lampiran 85 dan memerintahkan petisyen pemiutang disampaikan kepada penghutang penghakiman dalam masa tujuh hari. Tidak berpuas hati dengan keputusan tersebut, pemiutang penghakiman memfailkan rayuan dalam lampiran 117 menurut A 56 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Berkenaan permohonan kedua untuk mengenepikan perintah kebankrapan ('lampiran 102'), alasan yang disandarkan oleh penghutang penghakiman ialah petisyen pemiutang tersebut adalah tidak teratur kerana ia dikemukakan lebih daripada enam bulan selepas perbuatan kebankrapan didakwa berlaku pada 17 Januari 2022. Lampiran 102 telah ditolak oleh PKP, oleh itu, rayuan dalam lampiran 126 telah difailkan oleh penghutang penghakiman menurut A 56 k 1 KKM 2012. Berkenaan dengan lampiran 117, isu yang perlu ditentukan oleh mahkamah ialah: (a) sama ada penyampaian petisyen pemiutang ke atas firma peguambela yang dilantik oleh penghutang penghakiman, yang telah memfailkan notis pelantikan sebagai peguambela penghutang penghakiman ('lampiran 13') yang direkodkan dalam tindakan kebankrapan, adalah dibenarkan di sisi undang-undang; dan (b) sama ada penghutang penghakiman dihalang daripada mendakwa bahawa dia tidak melantik atau membenarkan firma peguambela semasanya untuk menerima penyampaian petisyen pemiutang bagi pihaknya. Bagi lampiran 126, isu utama yang timbul ialah sama ada petisyen pemiutang, yang dikemukakan oleh pemiutang penghakiman, dan berdasarkan perbuatan kebankrapan yang berpunca daripada ketidakpatuhan penghutang penghakiman terhadap notis kebankrapan yang dikeluarkan oleh pemiutang penghakiman pada 8 November 2021 dan disampaikan kepada penghutang penghakiman pada 5 Januari 2022 adalah di luar tempoh masa yang ditetapkan di bawah undang-undang insolvensi.

Diputuskan, membenarkan lampiran 117 dengan kos RM3,000 dan menolak lampiran 126 dengan kos RM3,000:

(1) Penyampaian petisyen pemiutang kepada firma peguambela atau peguamcara adalah dibenarkan apabila terdapat petunjuk jelas secara bertulis bahawa firma peguambela atau peguamcara tersebut mempunyai kuasa untuk menerima penyampaian tersebut bagi pihak penghutang penghakiman. Penghutang penghakiman dalam kes semasa telah melantik firma peguambelanya yang sekarang untuk bertindak bagi

pihaknya dalam tindakan kebankrapan dan firma peguambela tersebut telah memfailkan notis pelantikan sebagai peguambela (lampiran 13). Lampiran 13 ialah petunjuk bertulis yang mengesahkan bahawa firma peguambela penghutang penghakiman semasa yang direkodkan dalam tindakan kebankrapan semasa telah diberi kuasa untuk menerima penyampaian petisyen pemiutang bagi pihak penghutang penghakiman dalam prosiding dalam tindakan kebankrapan semasa (lihat perenggan 38–39 & 42–43).

(2) Adalah tidak boleh diterima dan ketidakadilan yang serius akan berlaku, jika penghutang penghakiman, setelah melantik firma peguambelanya yang sekarang untuk mewakili dan bertindak baginya dalam tindakan kebankrapan dan untuk menerima penyampaian dokumen — terutamanya apabila firma peguambela tersebut telah menerima penyampaian petisyen pemiutang — boleh secara selektif mendakwa bahawa firma peguambela yang dipilih dan dilantiknya tidak diberi kuasa untuk menerima petisyen pemiutang atau apa-apa dokumen dalam prosiding kebankrapan bagi pihaknya, semata-mata untuk menyokong kesnya. Oleh itu, penghutang penghakiman adalah dihalang daripada mendakwa bahawa dia tidak melantik atau membenarkan firma peguambela semasanya untuk menerima penyampaian petisyen pemiutang bagi pihaknya (lihat perenggan 44–45).

(3) Berdasarkan alasan-alasan di atas, PKP telah terkhilaf dari segi undang-undang apabila menyatakan bahawa penyampaian petisyen pemiutang kepada firma peguambela penghutang penghakiman semasa yang dilantik dalam rekod untuk bertindak bagi penghutang penghakiman dalam tindakan kebankrapan yang mana firma peguambela tersebut telah pun menerima penyampaian notis kebankrapan bagi pihak penghutang penghakiman, bukanlah penyampaian yang sah oleh penghutang penghakiman (lihat perenggan 46).

(4) Menurut s 3(1)(i) Akta Insolvensi 1967 ('Akta 360'), memandangkan notis kebankrapan dalam kes ini telah disampaikan kepada penghutang penghakiman pada 5 Januari 2022 dengan penyampaian gantian menurut perintah mahkamah, penghutang penghakiman akan melakukan perbuatan kebankrapan pada 13 Januari 2022 setelah berlakunya ketidakpatuhan oleh penghutang penghakiman terhadap notis kebankrapan tersebut. Walau bagaimanapun, permohonan penghutang penghakiman untuk mengenepikan notis kebankrapan tersebut telah menangguhkan perbuatan kebankrapan akibat ketidakpatuhan terhadap notis kebankrapan tersebut sehingga permohonan tersebut telah didengar dan diputuskan oleh PKP. Memandangkan PKP telah membenarkan permohonan untuk mengenepikan notis kebankrapan pada 13 Jun 2022, tiada perbuatan

kebankrapan yang dilakukan oleh penghutang penghakiman pada masa itu melalui penguatkuasaan k 93(2) Kaedah-Kaedah Insolvensi 2017. Perbuatan kebankrapan dianggap berkuat kuasa dan selesai hanya pada 19 Oktober 2022 apabila hakim dalam kamar mengakas perintah PKP dan mengembalikan semula notis kebankrapan tersebut. Dalam hal ini, PKP adalah betul di sisi undang-undang dalam berpendapat bahawa perbuatan kebankrapan yang dilakukan oleh penghutang penghakiman telah diselesaikan atau ditangguhkan kepada 19 Oktober 2022 (lihat perenggan 51–52, 75–78 & 80).

(5) Pemiutang penghakiman mengemukakan petisyen pemiutang terhadap penghutang penghakiman pada 25 November 2022, iaitu dalam tempoh enam bulan yang ditetapkan oleh s 5(1)(c) Akta 360 yang ditafsirkan bersama k 93(2) Kaedah-Kaedah Insolvensi 2017 yang dikira dari tarikh keputusan hakim dalam kamar terdahulu yang bersidang dalam mengembalikan semula notis kebankrapan tersebut, iaitu pada 19 Oktober 2022. Walaupun apabila mengira dari 13 Jun 2022, tarikh keputusan PKP pada masa itu untuk mengenepikan notis kebankrapan, petisyen pemiutang yang dikemukakan oleh pemiutang penghakiman pada 25 November 2022 masih berada dalam tempoh enam bulan yang ditetapkan (lihat perenggan 79 & 82).]

Cases referred to

A Debtor (No 10 of 1953), Re; Ex parte The Debtor v Ampthill Rural District Council and Another [1953] 2 All ER 561, Ch D (refd)

Callow v Young (1886) 55 LT 543, Ch D (refd)

Court v Berlin and others [1897] 2 QB 396, CA (refd)

Evans v Bartlam [1937] AC 473, HL (refd)

Getz Brothers & Co GmbH v Pan-Malaysian Wood Products Sdn Bhd [1980] 2 MLJ 79; [1980] 1 LNS 21, FC (refd)

In A Debtor (No 44 of 1978), Re, Ex parte The Debtor v Chantry Mount and Hawthorns Ltd [1980] 1 WLR 665, Ch D (refd)

Kerajaan Malaysia v Beyond Gateway Sdn Bhd [2003] MLJU 178; [2003] 2 CLJ 527, HC (refd)

Lady De La Pole v Dick (1885) 29 Ch D 301, Ch D (refd)

Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd) [2014] 1 MLJ 439, CA (distd)

Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd) [2013] 4 MLJ 225, CA (refd)

Public Bank Berhad v Kemajuan Flora Sdn Bhd & Anor [2001] MLJU 467; [2001] AMEJ 0273; [2001] 8 CLJ 626, HC (refd)

Natarajan a/l Kuppusamy, Re, Ex P Co-Operative Central Bank Ltd (In Receivership) [1992] 2 MLJ 468, HC (refd)

RHB Bank Berhad v Welinko Sdn Bhd & Ors [2001] MLJU 692; [2002] 2 CLJ 321, HC (refd)
Sarjudin bin Haji Bahri v Punca Klasik Sdn Bhd & Anor [1997] MLJU 346; [1997] 2 CLJ Supp 481, HC (refd)
Soh Bok Yew v Cindee Developments Sdn Bhd [1977] 1 MLJ 242, FC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)
Underwood, Son & Piper v Lewis [1894] 2 QB 306, CA (refd)
Venkatlal Govindlal v Juggilal Kamalapat Hosiery [1955] ILR Bom 1059, HC (refd)
Westech Sdn Bhd v Thong Weng Lock [2017] 5 MLJ 368, FC (refd)
Wingfield Blew (Solicitors), Re [1904] 2 Ch 655, Ch D (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2) [1998] 5 MLJ 1; [1997] 4 CLJ 209, HC (refd)

Legislation referred to

Bankruptcy Rules 1967 (repealed by Insolvency Rules 2017) r 95
Bankruptcy Act 1914 [UK] s 4(1)(c)
Bankruptcy Rules 1915 [UK] r 141
Insolvency Act 1967 ss 3(1)(i), 5(1)(c), 6, 6(1)
Insolvency Rules 2017 rr 93, 93(1), (2), 108, 136, 284
Rules of Court 2012 O 38 r 10, O 56 r 1, O 62 r 13

Robert Tang (Ariffin, Lai and Kan) for the judgment creditor.
Lee Yi Eng (Arthur Lee, Lin & Co) for the judgment debtor.

Wong Siong Tung J:

THE MATTERS

[1] Before this court, there are two appeals under O 56 r 1 of the Rules of Court 2012, against the decisions of the learned senior assistant registrar made on 4 January 2024.

[2] The first appeal is filed by the judgment creditor (encl 117), contesting the learned senior assistant registrar's decision on 4 January 2024 to grant the judgment debtor's notice of application dated 19 September 2023 (encl 85), which sought to set aside the bankruptcy order issued against the judgment debtor on 3 January 2023 on the ground that the judgment debtor was never served with the creditor petition.

[3] The second appeal is filed by the judgment debtor (encl 126) against the decision of the learned senior assistant registrar made on the same day in dismissing the judgment debtor's notice of application (encl 102) also in seeking to set aside the same bankruptcy order made against the judgment

A debtor, this time alleging irregularity in the creditor petition.

APPEAL UNDER O 56 R 1 OF THE RULES OF COURT 2012

[4] In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (FC), the Federal Court held that appeals from decisions of the registrar to a judge in chambers are by way of an actual rehearing. The judge treats the matter as though it comes before him or her for the first time (see also: *Evans v Bartlam* [1937] AC 473 (HL); and *Kerajaan Malaysia v Beyond Gateway Sdn Bhd* [2003] MLJU 178; [2003] 2 CLJ 527).

BRIEF BACKGROUND

[5] On 8 November 2021, the judgment creditor procured the issuance of a bankruptcy notice by the court against the judgment debtor for a judgment debt for a sum of RM1.08m due under a judgment obtained by the judgment creditor against the judgment debtor in Originating Summons No SBW-24NCvC-10/4 of 2018.

[6] The bankruptcy notice was served on the judgment debtor by way of substituted service pursuant to a court order made on 28 December 2021 by publication of the prescribed advertisement in the *New Sarawak Tribune* newspaper on 5 January 2022 (see: affidavit of service filed as encl 11).

[7] On 21 January 2022, the judgment debtor instructed his present firm of advocates to act by filing a notice of appointment as advocates to act for the judgment debtor in the matter. (see: notice of appointment as advocates dated 21 January 2022 (encl 13).

[8] At the same time, on behalf of the judgment debtor, the judgment debtor's advocates took out a summons in chambers (encl 14) applying to set aside the bankruptcy notice on the grounds that the sum as claimed by the judgment creditor is not supported by evidence and that the sum claimed by the judgment creditor is disputed.

[9] The judgment debtor's application to set aside the bankruptcy notice was heard by the learned senior assistant registrar then, who on 13 June 2022, allowed the judgment debtor's application and set aside the bankruptcy notice (see: encl 37).

[10] Not satisfied with the learned senior assistant registrar's decision then, the judgment creditor lodged an appeal by a notice of appeal dated 20 June 2022 against the decision under O 56 r 1 of the Rules of Court 2012 to the judge in chambers (see: encl 38).

[11] On the 19 October 2022, the learned judge previously presiding, allowed the judgment creditor's appeal and the order of the senior assistant registrar made on 13 June 2022 was set aside. The bankruptcy notice was thus restored or reinstated (see: encl 61).

[12] On 7 November 2022, the judgment debtor then lodged a notice of appeal to the Court of Appeal against the decision of the learned previous presiding judge which appeal was registered as Court of Appeal Civil Case No Q-03(IM)(NCvC)-107–11 of 2022.

[13] In the meanwhile, on 25 November 2022, the judgment creditor presented a creditor's petition against judgment debtor based on the non-compliance by the judgment debtor of the restored or reinstated bankruptcy notice (see: encl 70).

[14] On 3 January 2023, the learned senior assistant registrar then made a bankruptcy order against the judgment debtor (see: encl 79).

[15] More than nine months later, that is on 19 September 2023, the judgment debtor by his current appointed firm of advocates advocates, filed the said notice of application dated 19 September 2023 (encl 85) to set aside the bankruptcy order on the ground that he was never served with the creditor petition.

[16] Then, over two months later, on 4 December 2023, the judgment debtor by his appointed advocates, filed the said notice of application (encl 102) also applied to set aside the bankruptcy order on the ground that the creditor petition was irregularly, that is the creditor petition was presented more than six months after the act of bankruptcy allegedly occurred on 17 January 2022.

[17] The learned senior assistant registrar heard both the judgment debtor's applications together. On 4 January 2024, the learned senior assistant registrar granted judgment debtor's application (encl 85) and set aside the bankruptcy order due to irregular service of the creditor petition. The learned SAR ordered the creditor petition to be served on judgment debtor within seven days and scheduled a hearing of the creditor petition for 21 February 2022.

[18] Simultaneously, the learned senior assistant registrar dismissed judgment debtor's second application (encl 102), rejecting the ground that the creditor petition was presented beyond the prescribed time under insolvency law.

[19] Hence, these two appeals of the judgment creditor under encl 117 and of the judgment debtor under encl 126 before this court.

[20] Both appeals were heard together by this court.

JUDGMENT CREDITOR'S APPEAL (ENCL 117) IN RESPECT OF THE SAR'S DECISION WHICH GRANTED THE JUDGMENT DEBTOR'S NOTICE OF APPLICATION (ENCL 85)

[21] It is indisputable the creditor petition was served on 12 December 2022 on the judgment debtor's current firm of advocates appointed to act in the bankruptcy action which firm of advocates has also acknowledged receipt of it.

[22] However, the judgement debtor alleged that he did not appoint his current firm of advocates whom he appointed to act in the bankruptcy action, to accept service of creditor petition on his behalf (see: para 5 of encl 91 read with para 4 of encl 92).

[23] In allowing the judgment debtor's application (encl 85) to set aside the bankruptcy order, the learned senior assistant registrar held that the service of the creditor petition in this case on the judgment debtor's current firm of advocates appointed to act in the action is defective and contrary to r 108 of the Insolvency Rules 2017 read with s 6(1) of the Insolvency Act 1967.

[24] The learned senior assistant registrar held that by the said provisions, it is mandatory that the creditor petition be served on the judgment debtor personally.

[25] The issues for determination in this judgment creditor's appeal are twofold: firstly, whether serving the creditor petition on judgment debtor's currently firm of advocates, who have filed the notice of appointment as judgment debtor's advocates on record in the bankruptcy action, is permissible in law; and secondly, whether the judgment debtor is precluded from claiming that he did not appoint or authorise his current firm of advocates to accept service of the creditor petition on his behalf.

[26] On the first issue, s 6 of the Insolvency Act 1967 so far as relevant provides that:

> 6 Proceedings and order on creditor's petition
>
> (1) ...
>
> (1A) Notwithstanding subsection (2), the court may make an order for substituted

service of a creditor's petition as prescribed if the creditor can prove to the satisfaction of the court that the debtor, with intent to defeat, delay or evade personal service —

(a) departs out of Malaysia or being out of Malaysia remains out of Malaysia; or

(b) departs from his dwelling house or otherwise absents himself, or secludes himself in his house or closes his place of business.

(1B) An application for an order for substituted service shall state the facts on which the application is founded.

(1C) A substituted service of a creditor's petition, in relation to which an order is made under this section, is effected by taking such steps as the court may direct to bring the creditor's petition to the person to be served.

(2) ... (7)

[27] Rule 108 of the Insolvency Rules 2017 provides that:

108 Personal service

A creditor's petition *shall be personally served* and the service shall be effected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor. (Emphasis added.)

[28] However, in *Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)* [2014] 1 MLJ 439, the Court of Appeal held at para 12 that:

[12] *Rule 109 makes it mandatory for the creditor's petition to be served personally (kediri) on the judgment debtor*. The sealed copy of the petition must be delivered personally to the debtor. In the event that prompt personal service cannot be effected, after attempts have been made, the only avenue left is to apply for substituted service as provided for under r 110. Substituted service can only be effected with leave of the court. *With the clear provisions of the above rules, it is our view that the creditor's petition against a judgment debtor cannot be served by any other means. It cannot be served on a firm of solicitors, unless there is a clear indication (in writing) that the said firm of solicitors has the authority to accept service of the documents on behalf of the judgment debtor*. (Emphasis added.)

[29] That being the case, though it is mandatory for the creditor petition to be served personally on the judgment debtor, when there is clear indication in writing that a firm of solicitors have been authorised to accept service on behalf of the judgment debtor, the creditor petition may be served on that firm of solicitors.

[30] In *Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)*, the creditor petition was served by post to a firm of solicitors

A alleged to be the solicitors of the judgment debtor. In that case, there was no indication in writing that the firm of solicitors concerned was authorised to accept service of the creditor petition on behalf of the judgment debtor and the judgment creditor was unable to produce any form of authority to show that the firm of solicitors concerned have the authority to accept service of the
B creditor petition on behalf of the judgment debtor. Thus, the Court of Appeal held that the service of the creditor petition was bad and consequently, the Court of Appeal allowed the judgment debtor's appeal in that case and set aside the creditor petition as well as the adjudication order and receiving order made against the judgment debtor.
C

[31] Unlike the facts in *Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)*, in the present case, the firm of advocates currently representing the judgment debtor have filed and served a notice of
D appointment as advocates dated 21 January 2022 (encl 13) in this bankruptcy action. Judicial notice should be taken of this document filed in the action (see: O 38 r 10 of the Rules of Court 2012) (see also: *RHB Bank Berhad v Welinko Sdn Bhd & Ors* [2001] MLJU 692; [2002] 2 CLJ 321).

E **[32]** The notice of appointment as advocates dated 21 January 2022 (encl 13), addressed to the registrar and the judgment creditor's advocates, and filed in the action, explicitly states that the current firm of advocates has been appointed to act as advocates for the judgment debtor in the matter. It also provides their address for the service of documents in this bankruptcy action.

F

[33] The Insolvency Act 1967 and the Insolvency Rules 2017 do not contain specific provisions regulating the appointment of advocates by debtors to represent them in bankruptcy matters or action. Additionally, there are no provisions outlining the process for filing a notice of appointment of advocates
G on behalf of a debtor in bankruptcy action. Furthermore, these laws do not address the procedure for debtor appointed advocates to accept service of the cause papers in bankruptcy proceedings, including creditor petitions.

[34] However, r 284 of the Insolvency Rules 2017 provides that:

H

> 284 Rules of Court 2012 applicable in event of lacunae
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> In the absence of any rule regulating any proceeding under the Act or these Rules, *the Rules of the Court 2012 shall apply, mutatis mutandis*. (Emphasis added.)

I **[35]** Since there is no express provisions, thus a lacunae in the Insolvency Rules 2017 providing for appointment by the parties in proceedings in bankruptcy action of advocates or solicitors to act and represent them, the relevant rules in the Rules of Court 2012 relating to the appointment of advocates or solicitors to act for the parties in the ordinary actions with

necessary changes or modifications, shall apply by virtue of r 284 of the Insolvency Rules 2017 for proceedings in bankruptcy action.

[36] O 62 r 13 of the Rules of Court 2012 applicable for service of documents on parties' appointed advocates or solicitors on record in an action, is reproduced as follows:

> 13 Service upon solicitor or party formerly appearing in person (O 62 r 13)
>
> Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants and other documents, proceedings, and written communications which ought to be delivered to or upon the party on whose behalf the notice is given shall thereafter be delivered to or upon such solicitor. (Emphasis added.) (See also: O 62 r 1(3) and O 64 r 2 of the Rules of Court 2012.)

[37] The ruling of the Court of Appeal in *Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)* to the effect that a creditor petition can be considered validly served on a firm of solicitors if there is clear indication (in writing) that the firm has the authority to accept service of the creditor petition on behalf of the judgment debtor, aligns with the pertinent provisions of the Rules of Court 2012 on the appointment of solicitors by the parties in the action.

[38] Thus, it is permissible to serve the creditor petition on a firm of advocates or solicitors when there is clear indication in writing that the firm of advocates or solicitors have the authority to accept service of the same on behalf of a judgment debtor.

[39] The rule has been that service on the advocates or solicitors who filed and served the notice of appointment as advocates or solicitors for a party in an action and thus placed themselves on record is good service on the party that the advocates or solicitors are so representing (see: *Public Bank Berhad v Kemajuan Flora Sdn Bhd & Anor* [2001] MLJU 467; [2001] AMEJ 0273; [2001] 8 CLJ 626 (HC); *Getz Brothers & Co GmbH v Pan-Malaysian Wood Products Sdn Bhd* [1980] 2 MLJ 79; [1980] 1 LNS 21 (FC); and *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2)* [1998] 5 MLJ 1; [1997] 4 CLJ 209 (HC)).

[40] Thus, as long as the current firm of advocates retained by the Judgment debtor remains on record or officially designated in this bankruptcy action as the firm of advocates acting for the judgment debtor, service of any documents, including the creditor petition, upon the current firm of advocates constitutes valid service on the judgment debtor (see also: *Lady De La Pole v Dick* (1885)

29 Ch D 301 and *Callow v Young* (1886) 55 LT 543).

[41] The retainer of advocates or solicitors to conduct or defend an action for their clients would generally continue until the final conclusion of the cause or matters in the action (see: *Sarjudin bin Haji Bahri v Punca Klasik Sdn Bhd & Anor* [1997] MLJU 346; [1997] 2 CLJ Supp 481, *Underwood, Son & Piper v Lewis* [1894] 2 QB 306, *Court v Berlin and others* [1897] 2 QB 396 and *Re Wingfield & Blew (Solicitors)* [1904] 2 Ch 655).

[42] Given that the judgment debtor has appointed his current firm of advocates to act on his behalf in this bankruptcy action and the said firm of advocates has filed the notice of appointment as advocates (encl 13) accordingly, it must be taken that the judgment debtor has authorised his current firm of advocates to act for him in all matters in the bankruptcy action, including accepting service of the creditor petition on their behalf in the proceeding in this bankruptcy action.

[43] This notice of appointment as advocates (encl 13) is written indication that confirms that the judgment debtor's current firm of advocates on record in this bankruptcy action is authorised to accept service of the creditor petition on behalf of the judgment debtor in the proceedings in this bankruptcy action.

[44] It would be intolerable, and lead to the gravest injustice, if the judgment debtor having appointed his current firm of advocates to represent and act for him in the proceedings in this bankruptcy action and accepting service of documents — particularly when the firm of advocates have indeed accepted service of the creditor petition — could selectively claim that his chosen and appointed firm of advocates was not authorised to accept on his behalf, the creditor petition or any documents in the proceedings in this bankruptcy action, all to suit his case.

[45] Therefore, on the second issue, and for the reasons as given, the judgment debtor is precluded from claiming and cannot be heard to say that he did not appoint or authorise his current firm of advocates to accept service of the creditor petition on his behalf.

[46] That being the case, the learned senior assistant registrar has erred in law in holding that the service of the creditor petition on the judgment debtor's current firm of advocates appointed on record to act for the judgment debtor in the bankruptcy action which firm of advocates have in fact accepted service of the bankruptcy notice on behalf of the judgment debtor, is not valid service of the creditor petition.

[47] Consequently, for the reasons given, this court allows the judgment

creditor's appeal under encl 117 with costs in the sum of RM3,000.

[48] The decision and order of the learned senior assistant registrar made on 4 January 2024 is therefore set aside and the bankruptcy order made against the judgment debtor on 3 January 2023 is hereby reinstated or restored.

JUDGMENT CREDITOR'S APPEAL (ENCL 126) IN RESPECT OF THE SAR'S DECISION WHICH DISMISSED THE JUDGMENT DEBTOR'S NOTICE OF APPLICATION (ENCL 102)

[49] The central question to be resolved in the judgment debtor's appeal is whether the creditor's petition, presented by the judgment creditor, and grounded on the act of bankruptcy stemming from the judgment debtor's non-compliance with the bankruptcy notice issued by the judgment creditor on 8 November 2021 served on the judgment debtor on 5 January 2022 is out of the prescribed time period under the insolvency law.

[50] Section 5(1)(c) of the Insolvency Act 1967 provides as follows:

> 5 Conditions on which creditor may petition
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —
>
> (a) ...
>
> (b) ...
>
> (c) the act of bankruptcy on which the petition is grounded *has occurred within six months before the presentation of the petition;*
>
> (d) ...
>
> ...
>
> (7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition.

[51] Under s 3(1)(i) of the Insolvency Act 1967, a judgment debtor commits an act of bankruptcy if he/she fails to comply with a bankruptcy notice within seven days after it has been served on him/her.

[52] In the instant case, since the bankruptcy notice was served on the judgment debtor on 5 January 2022 by substituted service pursuant to court order, the judgment debtor would have committed the act of bankruptcy on 13 January 2022 upon the judgment non-compliance with the bankruptcy notice.

[53] However, the judgment debtor has filed application to set aside the bankruptcy notice.

[54] Rule 93 of the Insolvency Rules 2017 provides that:

> 93 Application to set aside
>
> (1) *The filing of an affidavit shall operate as an application to set aside the bankruptcy notice*, and the Registrar shall fix a day for the hearing of the application, and shall give not less than three clear days notice to the debtor, the creditor and their respective solicitors, if known.
>
> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, *the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined*. (Emphasis added.)

[55] Section 136 of the Insolvency Rules 2017 further provides that:

> 136 Bankruptcy order on bankruptcy notice
>
> A *bankruptcy order shall not be made against a debtor —*
>
> (a) *on a petition in which the act of bankruptcy alleged is non-compliance with a bankruptcy notice within the appointed time where such debtor has applied to set aside such notice until after the hearing of the application;*
>
> (b) where the notice has been set aside; or
>
> (c) during a stay of the proceedings thereon but in such case the petition shall be adjourned or dismissed as the court thinks fit. (Emphasis added.)

[56] The issue revolves around the interpretation of the relevant insolvency rules and the effects on the determination of when the act of bankruptcy occurred, for the purpose of computing the time period for presenting a creditor's petition.

[57] In the case of *Re A Debtor (No 10 of 1953); Ex parte The Debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561, a bankruptcy notice was issued against the judgment debtor, who then sought to set it aside in that case. The registrar in that case, dismissed the application on 10 September 1952. Subsequently, the Divisional Court discharged the registrar's order and set aside the bankruptcy notice, but the Court of Appeal, on 10 February 1953, reversed the Divisional Court's decision, restoring the registrar's order made on 10 September 1952.

[58] The judgment creditor presented the creditor's petition on 10 March 1953, and upon which the Registrar made a receiving order.

[59] In that case, the applicable provision of s 4(1)(c) of the English Bankruptcy Act 1914 is similar to s 5(1)(c) of our Insolvency Act 1967 with a difference only in the prescribed period for presenting the creditor petition. A

[60] Under the English Bankruptcy Act 1914, the period is within three months from the act of bankruptcy committed by the judgment debtor, whereas under our Insolvency Act 1967, it is six months B

[61] The key issue before the Divisional Court in that case was whether the prescribed three months for presenting the creditor's petition should be calculated from the registrar's initial decision (ie on 10 September 1952) or the Court of Appeal's decision overturning the Divisional Court's ruling (ie on 10 February 1953). C

[62] Referring to r 141 of the English Bankruptcy Rules 1915 (SR & O 1914, No 1824/L 47), which is similar to r 93 of our Insolvency Rules 2017, Harman J held that the rule is directory. When the application cannot be heard in time as notified, it mandates the registrar to extend the time to comply with the bankruptcy notice 'until the application has been heard and determined'. D E

[63] Importantly, Harman J held that this directive solely applies to the registrar's determination and not to decisions made by the Divisional Court or the Court of Appeal regarding the validity of the bankruptcy notice. F

[64] Therefore, it was determined that the prescribed three month period for presenting the creditor petition by the judgment creditor in that case commenced on 10 September 1952 when the registrar dismissed the judgment debtor's application to set aside the bankruptcy notice. This date was the starting point over the date of the Court of Appeal's decision on 10 February 1953. G

[65] Consequently, the creditor's petition, presented on 10 March 1953 by the judgment creditor in that case was held out of time and as a result, the judgment debtor's appeal was upheld, and the petition was dismissed. H

[66] In the current case, a notable distinction exists as the then learned senior assistant registrar initially, which is on 13 June 2022 allowed and granted the judgment debtor's application to set aside the bankruptcy notice in this bankruptcy action and thus, the bankruptcy notice was set aside. Any act of bankruptcy cannot take effect for non-compliance with it. I

[67] However, this decision of the then learned senior assistant registrar on

13 June 2022 in this case was subsequently overturned by the previous presiding judge on a later date that on 19 October 2022 upon the appeal by the judgment creditor to the judge in chambers under O 56 r 1 of the Rules of Court 2012.

[68] This differs from *Re A Debtor (No 10 of 1953); Ex parte The Debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561, where the registrar initially dismissed the judgment debtor's application to set aside the bankruptcy notice and thus affirmed the validity of the bankruptcy notice. The Divisional Court, on appeal, then reversed the Registrar's decision, and subsequently, the Court of Appeal overturned the Divisional Court's ruling, ultimately reinstating the registrar's original decision, upholding the validity of the bankruptcy notice.

[69] Regarding the judgment creditor's contention in *Re A Debtor (No 10 of 1953); Ex parte The Debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561, that the time for presenting the creditor's petition should start from the date (ie on 10 February 1953) the Court of Appeal reversed the Divisional Court's decision and reinstated the registrar's ruling, Harman J stated at p 1055 that:

> It was pointed out to us on behalf of the appellant that under RSC, O 58, r 16, which applies to a Divisional Court in Bankruptcy under r 134 of the rules of 1915 (to which r 132 of the rules of 1952 corresponds), an appeal does not operate as a stay of execution or of proceedings under the decision appealed from unless the court so orders. The only case touching on this matter to which we were referred was *Nitrate Producers SS Co Ltd v Short Bros Ltd*. The immediate point is not relevant, but Lord Buckmaster in the course of his speech, in which the other Lords concurred, said (127 LT 727):
>
> > It is, of course, a totally different proposition where the effect of an order in this House is to restore a judgment of the court of first instance which has been reversed by an order of the Court of Appeal. In that case the judgment of the court of first instance is expressly restored and remains standing as from the date when it was given.
>
> So here the Court of Appeal reversed the Divisional Court and *restored the registrar's judgment, which, accordingly, remains standing as from the date when it was given*, viz, 10 September 1952. In our judgment, therefore, the appeal succeeds on this ground. (Emphasis added.)

[70] Harman J seems to hold that when the registrar initially sets aside the bankruptcy notice (as opposed to affirming it) and this decision is later overturned by the appellate court, the crucial date for calculating the commencement of the time period to present the creditor's petition is the date of the appellate court's decision. This is the moment when the appellate court reverses the registrar's decision and replaces it, thereby established the

effectiveness of the bankruptcy notice and completed the act of bankruptcy. A

[71] The decision in *Re A Debtor (No 10 of 1953); Ex parte The Debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561 has been adopted and followed by the Federal Court in *Westech Sdn Bhd v Thong Weng Lock* [2017] 5 MLJ 368 (FC) and *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 (FC). B

[72] In *Westech Sdn Bhd v Thong Weng Lock*, the registrar dismissed the application of a judgment debtor to set aside the bankruptcy notice issued against him. The Federal Court held at para 39 that: C

> [39] Rule 95 of the BR is the *statutory exception which defers an act of bankruptcy committed as envisaged by s 3(1)(i) of the BA*. It is couched with stringent requirements and legal effects, in particular the portion of r 95(2) of the BR which reads, *'... no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined'*. (Emphasis added.) D

Rule 95 of the Bankruptcy Rules 1967 is in pari materia with r 93 of the Insolvency Rules 2017 (see also: *Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd)* [2013] 4 MLJ 225 (CA); *Re Natarajan a/l Kuppusamy, Ex P Co-Operative Central Bank Ltd (In Receivership)* [1992] 2 MLJ 468; *In re A Debtor (No 44 of 1978), Ex parte The Debtor v Chantry Mount and Hawthorns Ltd* [1980] 1 WLR 665 and *Venkatlal Govindlal v Juggilal Kamalapat Hosiery* [1955] ILR Bom 1059. E F

[73] To recap the indisputable facts in this case, the judgment debtor took out his application to set aside the bankruptcy notice in the bankruptcy action supported by his affidavit on 21 January 2022. G

[74] Although the application was in the form of a 'summons in chambers', not strictly following r 93(1) of the Insolvency Rules 2017 which requires only an affidavit to filed, it is to be taken as an application under r 93(1) of the Insolvency Rules 2017 (see: *Re Natarajan a/l Kuppusamy, Ex P Co-Operative Central Bank Ltd (In Receivership)* [1992] 2 MLJ 468)). H

[75] The application by the judgment debtor in this case to set aside the bankruptcy notice deferred the act of bankruptcy consequential upon non-compliance thereto until the application has been heard and determined by the learned senior assistant registrar. I

[76] Since the learned senior assistant registrar then allowed the judgment debtor's application and set aside the bankruptcy notice on 13 June 2022, there

was no act of bankruptcy committed by the judgment debtor then by the operation of r 93(2) of the Insolvency Rules 2017.

[77] However, on 19 October 2022, the previous presiding judge in chambers allowed the judgment creditor's appeal, overturning the then learned senior assistant registrar's order made on 13 June 2022. This resulted in the restoration of the bankruptcy notice and its effectiveness from 19 October 2022, as per the legal principle in *Re A Debtor (No 10 of 1953); Ex parte The Debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561.

[78] Thus, the act of bankruptcy stemming from non-compliance with the bankruptcy notice by the judgment debtor in this case is deemed effective and completed only on 19 October 2022 and not on 13 January 2022 (eg seven days after service of the bankruptcy notice) because the bankruptcy notice was set aside by the then learned senior assistant registrar and thus no act of bankruptcy can take effect on that date.

[79] On 25 November 2022, the judgment creditor presented the creditor petition against judgment debtor, that was within the six period prescribed by s 5(1)(c) of the Insolvency Act 1967 construed with r 93(2) of the Insolvency Rules 2017 counting from the date of the decision of the previous presiding judge in chambers in restoring the bankruptcy notice in this case (ie on 19 October 2022).

[80] That being the case, the learned senior assistant registrar is correct in law in holding to the effect that the act of bankruptcy committed by the judgment debtor was completed or deferred to 19 October 2022, the date when the previous presiding judge in chambers overturned the then learned senior assistant registrar's order, restoring the bankruptcy notice.

[81] Consequently, the learned senior assistant registrar has not erred in law and in facts in deciding to dismiss the judgment debtor's application to set aside the bankruptcy order based on the judgment debtor's contention that the creditor petition was presented beyond the stipulated time period.

[82] Even when calculating from 13 June 2022, the date of the then senior assistant registrar's decision to set aside the bankruptcy notice (which was later reinstated by the previous presiding judge upon judgment creditor's appeal to the judge in chambers), the creditor petition presented by the judgment creditor on 25 November 2022 still falls within the prescribed six months period.

[83] In the premises, this court dismisses the judgment debtor's appeal under encl 126 with costs in the sum of RM3,000 as well.

Enclosure 117 allowed with cost of RM3,000; encl 126 dismissed with costs of RM3,000.

Reported by Dzulqarnain Ab Fatar